IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1344

MARILYN ELAINE MAY, Administratrix of the Estate of Stephen Todd May,

Petitioner,

v.

DR. RICHARD GOLDMAN

and

DR. ROBERT JAY O'BRIEN, Individually and T/DB as the FALLS CHURCH DENTAL HOSPITAL

and

DR. LEWIS E. MANGUS,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

E. WALLER DUDLEY
Boothe, Prichard and Dudley
711 Princess Street
P. O. Box 1101
Alexandria, Virginia 22313
703-549-5900
Counsel for Respondents

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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OPINION BELOW

The opinions below are adequately set forth in the Petitioner's brief at page 2.

JURISDICTION

The jurisdictional requisites are set forth in Petitioner's brief at page 2.

FEDERAL QUESTIONS PRESENTED

1. Whether due process requires that Virginia provide a plaintiff an absolute right of appeal from an adverse judgment in the trial court.
2. Whether Virginia's discretionary system of appeals violates the equal protection clause of the fourteenth amendment.

STATEMENT OF THE CASE

Petitioner originally brought a civil action in tort against the respondents. Her claims for medical malpractice and wrongful death were tried before the Circuit Court of Arlington County, Virginia. After three weeks of trial and lengthy deliberation, the jury returned a verdict in favor of respondents. Petitioner subsequently filed a petition for writ of error with the Virginia Supreme Court. The trial transcript and briefs of petitioner and respondent were submitted. A twenty minute hearing with oral argument by petitioner was held before three justices of the Virginia Supreme Court on the issue of granting the appeal. The Virginia Supreme Court subsequently handed down a decree rejecting the petition for writ of error. It is from this decree of the Virginia Supreme Court the petitioner seeks review by this Court on Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

DUE PROCESS DOES NOT REQUIRE THAT A STATE PROVIDE A PLAINTIFF AN ABSOLUTE RIGHT OF APPEAL FROM AN ADVERSE JUDGMENT IN THE TRIAL COURT.

A. The Supreme Court case precedent on this point is substantial, recent, and controlling; therefore, the writ should be denied.

In *McKane v. Durston*, 153 U.S. 684, 687 (1894), Mr. Justice Harlan said for an unanimous court:

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment . . . was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review.

As recently as one year ago, the Court in a *per curiam* opinion reaffirmed the holding of *McKane v. Durston*, stating,

> This Court has long recognized that, even in criminal cases, due process does not require a state to provide an appellate system.

Ortwein v. Schwab, 410 U.S. 656, 660 (March 5, 1973).

In support of that holding the Court offered a lengthy citation of cases which over the years have re-affirmed *McKane v. Durston*.[1] In a separate opinion Mr. Justice Marshall clearly indicated that such cases controlled "efforts to secure appellate review of a decision by a

[1] *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973). *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972).

lower court."[2] Respondent, therefore, submits that *McKane v. Durston* and its substantial and recent progeny directly contradict the petitioner's assertion that due process entitled her to an appeal as a matter of right.[3] Therefore, respondents urge this Court to deny the writ.

B. Under the facts of this case, Virginia's judicial system has afforded petitioner due process. Therefore, this writ should be denied.

With regard to a litigant's initial access to the courts, Mr. Justice Harlan has said that "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1970) citing *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 318 (1950). And with regard to appellate review, Mr. Justice White has stated for the Court:

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[2] It is to be noted that Mr. Justice Marshall's comment was made in a footnote to his dissenting opinion in *Ortwein v. Schwab*, 410 U.S. at 665. In his view, the holding of *McKane v. Durston* was correct as applied to appellate review of judicial decisions made in *some* court of law. However, he questioned whether due process did not require appellate review of administrative actions whose legality had never been ruled on in any court. Respondents hasten to point out that petitioner was afforded a jury trial of her claims before the Circuit Court of Arlington County, Virginia. There was no administrative action involved in the case.

[3] It is immaterial that Virginia and West Virginia are the only two states in the country that do not grant appeal as a matter of right. Petitioner's Brief at p. 8. As Mr. Justice Harlan declared, "the constitution of the United States does not make the privileges and immunities enjoyed by the citizens of one state under the constitution and laws of that state, the measure of privileges and immunities to be enjoyed, as of right, by a citizen of another state under its constitution and laws." *McKane v. Durston*, 153 U.S. 684, 687 (1894).

> [I]f a full and fair trial on the merits is provided, the due process clause of the Fourteenth Amendment does not require a state to provide appellate review.[4]

Lindsey v. Normet, 405 U.S. 56, 77 (1972).

Against this background, respondent respectfully directs the Court's attention to the fact that (1) petitioner's tort claim was decided by a jury in the Circuit Court of Arlington County, Virginia, after three weeks of trial and lengthy deliberation, (2) the trial record and petitioner's brief were received, seen, and inspected by the Virginia Supreme Court, and (3) petitioner's oral argument on the issue of whether appeal should be granted was heard by three justices of the Virginia Supreme Court in an *ex parte* hearing lasting twenty minutes. Petitioner's brief at 6, 7 18, 20 and 1a.

The foregoing facts, respondent submits, more than adequately meet the "due process" requirements specified by this Court in *Boddie*, *Mullane*, and *Lindsey*, *supra*.[5] *Therefore, respondent urges that petitioner's writ be denied.*

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[4] *Note* that Congress has *not* provided for appeal, as of right, from the decisions of the U. S. Court of Claims. There seems, however, no discernible sentiment to the effect that litigants before that court obtain less "due process" than those before courts whose decisions are appealable.

[5] At page 20 of her brief, petitioner alleges error because three justices–instead of four justices–"decided" the constitutional question of a right of appeal. Such an assertion is fallacious. The Virginia Supreme Court had previously decided the constitutional question in *Blankenship v. Va. Unemployment Compensation Comm'n*, 177 Va. 250, 13 S.E.2d 409 (1941). Therefore, four justices were not required in any event.

II.

A DISCRETIONARY SYSTEM OF APPEALS DOES NOT VIOLATE EQUAL PROTECTION OF THE LAW WHERE THE SELECTION OF CASES TO BE GRANTED APPELLATE REVIEW IS MADE ON A RATIONAL BASIS AND NOT ON SUSPECT CLASSIFICATIONS.

A. The standard for testing discretionary review is "rational basis."

No suspect classification, such as race, nationality, or alienage, is involved in Virginia's system of discretionary appeals. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Nor is there discrimination "on account of . . . poverty," *Griffin v. Illinois*, 351 U.S. 12, 18 (1955) or any "financial barrier restricting the availability of appellate review," *Burns v. Ohio*, 360 U.S. 252, 258 (1959). Nor has appellate review of a lower court's decision been viewed as so fundamental a right as to be accorded the more rigorous standard of strict scrutiny and compelling state interest. Therefore, the applicable standard is one of rational basis.

Also, "whether an appeal should be allowed, and, if so, under what circumstances, or on what conditions, are matters" which traditionally have been left to "each state to determine for itself." *McKane v. Durston*, 153 U.S. 684, 688 (1894). As Mr. Justice Black said:

> [T]he right of appeal may be accorded by the State to the accused *upon such terms as in its wisdom may be deemed proper*. . . . The States have exercised this discriminating power. The different states and the same state from time to time conditioned . . . appeals by fixing the time within which an appeal may be taken, by delimiting the scope of review, by shaping the mechanism by which alleged errors may be brought before the appellate tribunal, and so forth. (Emphasis added.)

Griffin v. Illinois, 351 U.S. 12, 21 (1956). Given this historical grant of wide discretion to the states and this Court's recognition of the value of state experimentation and innovation, any test other than the "rational basis" test would be inappropriate.[6]

B. The Virginia standard for granting appeals clearly meets a rational basis test.

The Virginia Supreme Court, at an early date, declared that no case would be declined where there is shown to have been a substantial possibility of injustice below.

> We have no such practice as an absolute right of appeal in civil and criminal cases. But the law requires a petition, accompanied by a transcript of the record, to be presented to the court, or one of its judges, whose duty it is to examine the errors assigned and to grant or refuse a writ, as may seem proper. It is as much the duty of the court, or judge, to deny the petition when of the opinion that the decision complained of is plainly right as it is to grant it when any doubt exists as to the propriety of the decision.

McCue v. Commonwealth, 103 Va. 870, 1008, 49 S.E. 623, 632 (1905). Moreover, it is presumed that the authority to allow an appeal will be exercised in a proper case. *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937).

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[6] *See, e.g.*, Mr. Justice Powell's comments in *Johnson v. Louisiana*, 406 U.S. 356 (1972) to the effect that "one of the more obvious merits of our federal system is the opportunity it affords each state, if its people so choose, to become a 'laboratory' and to experiment with a range of trial and procedural alternatives." Respondents submit that the ever increasing demands on the states' appellate courts make it especially important that the states' discretion and imagination be left unrestricted and responsive to their peculiar situations.

Petitioner, however, challenges this presumption at page 13 of her brief. Citing an article by Professors Lilly and Scalia of the University of Virgina Law School,[7] petitioner suggests that Virginia has moved from a standard of "manifest injustice below" to one which only considers each case's "societal importance," *i.e.*, whether the legal point involved is one of general concern. This suggestion is directly refuted in the final report of a recently completed "in-depth" analysis of the Virginia Supreme Court, a project which Professor Lilly headed and whose report he authored:

> The justices indicated that the standard [of McCue v. Commonwealth] still prevails. The [project] staff attorneys saw no evidence to the contrary, although the statistics indicating a decline in the percentage of petitions granted gave rise to an inference that the standard of review has changed. . . . In fact, this decline in percentage may be attributable to a large number of frivolous appeals.[8]

Respondent submits that the standard of appellate review as clearly articulated in *McCue v. Commonwealth* has not been emasculated with time and that it represents

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[7] Lilly and Scalia, *Appellate Justice: A Crisis in Virginia?*, 57 Va. L. Rev. 3, 12-15 (1971).

[8] Lilly, *Appellate Justice Project: The Virginia Experience*, National Center for State Courts and the Law Enforcement Assistance Administration, Final Report, February 18, 1974, p. 23, fn. 36. This report represents the findings of the project staff attorneys who for over a year's time witnessed the Virginia Supreme Court's actions from receipt of petition to the final written decision, analyzed the court's efficiency, and explored other alternatives of appellate review. It is to be noted that the court enthusiastically cooperated with the attorneys and endorsed the study.

a rational basis for granting and denying appeals. Therefore, Virginia's discretionary system of appeals does not violate the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

E. WALLER DUDLEY
711 Princess Street
P. O. Box 1101
Alexandria, Virginia 22313
Counsel for Respondents